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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 BRIAN HOWARD ELLIOTT,

8 Petitioner,

9 v.

10 ELDON VAIL and WASHINGTON STATE
11 DEPARTMENT OF CORRECTIONS,

12 Respondents.

No. C11-5377 BHS/KLS

ORDER REGARDING MOTIONS TO
SUPPLEMENT RECORD, TO AMEND
HABEAS PETITION, and FOR LEAVE TO
PROCEED *IN FORMA PAUPERIS*

13 Before the Court are Petitioner's motions to supplement the state court record, to amend
14 his habeas petition, and for leave to proceed *in forma pauperis* (IFP). ECF Nos. 18, 19 and 20.

15 After careful review, the Court finds and **ORDERS** as follows:

16 **DISCUSSION**

17 **A. Motion to Supplement Relevant State Court Record – ECF No. 18**

18 Rule 5(c) of the rules governing § 2254 cases provides that the respondent shall indicate
19 in the answer to a habeas petition what transcripts are available and what proceedings have been
20 recorded but not transcribed. The State must attach to its answer any parts of the transcript it
21 deems relevant. Once this is done, the court, on its own motion or upon request of the petitioner
22 may order that further portions of the existing transcripts be furnished or that certain portions of
23 the non-transcribed proceedings be transcribed and furnished. Rules Governing Section 2254
24 Cases in the U.S. Dist. Cts., 28 U.S. C. Pt. VI, ch. 153, Rule 5 (emphasis added); *Simental v.*
25 *Matrisciano*, 363 F.3d 607, 612 (7th Cir. 2004). As noted by the *Simental* court, on habeas
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1 review, except in limited circumstances, the district court does not make independent factual
2 determinations. *Id.* citing 28 U.S.C. § 2254(e); *United States ex rel. Green v. Greer*, 667 F.2d
3 585, 586 (7th Cir. 1981) (an examination of a record is not required if the petitioner fails to
4 identify any incompleteness or inaccuracies in the facts before the district court.)

5 The Ninth Circuit’s holding in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985),
6 requiring that the district court examine all relevant parts of the state court record, is not
7 inconsistent with these holdings or Rule 5. Under Rule 5, the determination of relevance is left
8 to the discretion of the respondent. A demand for further documentation can only be executed
9 by court order *sua sponte* or by request of the petitioner. § 28 U.S.C.A. 2254, Rule 5, Advisory
10 Committee Notes, 1976 Adoption. Upon such a request the burden is placed on the petitioner to
11 prove to the court that the excluded materials requested are relevant and necessary. When a
12 dispute concerning relevance arises, the burden is on the petitioner to prove to the court that the
13 excluded materials are necessary for the petition. *Richmond v. Ricketts*, 640 F.Supp. 767 (Ariz.
14 1986).

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17 Mr. Elliott identifies three “deficiencies” in the state court record that has been provided
18 by Respondent:

- 19 1) The reply filed by Mr. Elliott in Washington Court of Appeals Case No. 39674-2-
20 II.

21 Mr. Elliott argues that this document is relevant because it “further federalized
22 Constitutional errors for the State Court’s consideration”. ECF No. 18 at 2. Respondent argues
23 that the reply brief is not relevant because, under state rules of appellate procedure, Mr. Elliott’s
24 reply brief should have been limited to the issues in the brief to which the reply brief is directed
25 and therefore, he could not have raised any new claims or presented previously presented claims
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1 as federal constitutional ones. ECF No. 22 at 3. Respondent contends that Mr. Elliott failed to
2 exhaust several of his claims, some for failure to present the claims as federal constitutional
3 ones. Therefore, in the interest of completeness and fairness, Respondent should provide a copy
4 of Mr. Elliott's reply as it may be relevant to the issue of exhaustion.

- 5 2) All portions of Mr. Elliott's second personal restraint petition (Case No. 40570-9-
6 II), including all documents filed with the state trial court and Washington
7 Supreme Court. ECF No. 18 at 2.

8 Mr. Elliott argues that these records are necessary to make a complete record "on a one
9 time effort at habeas relief." *Id.* at 3. Mr. Elliott's second personal restraint petition challenged
10 the conditions imposed in his Judgment and Sentence and raised no federal constitutional issues.
11 In addition, the Washington Supreme Court dismissed the petition as time-barred. As noted
12 below, the Court denies Mr. Elliott's motion to amend his habeas petition to include the claims
13 raised in his second personal restraint petition. Therefore, his motion to expand the record to
14 include documents relating to his second personal restraint petition is denied.

- 15 3) All pre-trial and trial transcripts including hearings on sentencing through June
16 29, 2005.

17 Respondent has produced no trial transcripts. *See* ECF No. 16 (Notice of Filing
18 Respondent's Submission of Relevant State Court Record). The Respondent must attach to its
19 answer any parts of the transcript it deems relevant to the claims raised by Mr. Elliott. However,
20 Respondent contends that all but one of Mr. Elliott's nine habeas claims are unexhausted and
21 procedurally barred. Respondent did not address these claims on the merits. A request for trial
22 transcripts as to these claims, therefore, is premature. If the Court determines that any of these
23 claims have, in fact, been properly exhausted, it will direct the parties to provide further briefing
24 along with the relevant state court record.
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1 As to claim four (an ineffective assistance of counsel claim relating to counsel's failure
2 to challenge a polygraph) the Washington appellate courts held that Mr. Elliott had failed to
3 present any evidence other than a lack of documentation suggesting that there were any
4 calibration or functionality issues with the polygraph and even if counsel had made a record on
5 this issue, Mr. Elliott failed to show a reasonable probability that the result of this trial would
6 have been different because the "State relied on compelling witness testimony." ECF No. 16,
7 Exhs. 10 and 12. The Court cannot make a full determination under *Strickland v. Washington*,
8 466 U.S. 668 (1984) without those portions of the trial transcript containing the "compelling
9 witness testimony." Accordingly, the Respondent shall produce the portions of the trial
10 transcript relevant to Mr. Elliott's fourth habeas claim.
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12 **B. Motion to Amend Habeas Petition – ECF No. 19**

13 Mr. Elliott moves to amend his habeas petition to include a tenth ground for relief.
14 Specifically, Mr. Elliott seeks to attack the amendment made to his judgment and sentence by the
15 trial court on June 29, 2005. He argues that the amendment was to be an administrative
16 correction only, but that without notice, twenty-two additional restraints were placed on his
17 liberty. ECF No. 19 at 5. Mr. Elliot raised this proposed ground for relief in his second
18 personal restraint petition. See ECF No. 22 (Exhibits 1-3) (Washington Court of Appeals Case
19 No. 40570-9-II; Washington Supreme Court Case No. 85349-95). However, the Washington
20 courts found the petition untimely under RCW 10.73.090. *Id.*
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23 A procedural default does not bar consideration of a federal claim on either direct or
24 habeas review unless the last state court rendering a judgment in the case clearly and expressly
25 states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263, 109
26 S.Ct. 1038, 103 L.Ed.2d 308 (1989). *Harris* is limited in scope, however, to circumstances in

1 which “it fairly appears that the state court rested its decision primarily on federal law.”

2 *Coleman v. Thompson*, 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

3 Here, there is no indication that the Washington Supreme Court rested its decision
4 primarily on federal law. Rather, the Washington Supreme Court denied review of Mr. Elliott’s
5 petition after expressly finding that RCW 10.73.090 barred the petition, the lower court properly
6 dismissed it, the sentence was facially valid, and no RCW 10.73.100 exemptions to the one year
7 time bar applied. ECF No. 22 at 2, Exh. 3 at 1-3. Thus, the claim is not cognizable in federal
8 court unless Mr. Elliott can show “cause” for the default and “prejudice attributable thereto,”
9 *Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1986), or
10 demonstrate that failure to consider the federal claim will result in a “fundamental miscarriage
11 of justice.” *Id.*, at 495, 106 S.Ct., at 2649, quoting *Engle v. Issac*, 456 U.S. 107, 135, 102 S.Ct.
12 1558, 1576, 71 L.Ed.2d 783 (1982). See also *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct.
13 2661, 2668, 91 L.Ed.2d 434 (1986).

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16 Mr. Elliott fails to show cause and prejudice. Mr. Elliott argues that leave to amend
17 should be granted so that he may avoid having to file successive federal habeas claims. Because
18 the proposed claim is untimely and procedurally defaulted, however, it is not cognizable in
19 federal court. Accordingly, this motion shall be denied.

20 **C. Motion to Proceed IFP – ECF No. 20**

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22 Mr. Elliott filed his habeas petition on May 16, 2011. ECF No. 1. At the time of filing,
23 he paid the \$5.00 filing fee. *Id.* (Receipt #T-8719). On October 13, 2011, he submitted an IFP
24 application. ECF No. 20. Mr. Elliott states that he seeks IFP status for the purpose of discovery,
25 the appointment of counsel and in the event of an appeal to the Ninth Circuit Court of Appeals.
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1 Pursuant to 28 U.S.C. § 1915(a)(1), a court may authorize the *commencement* of an
2 action, without the prepayment of fees, by a person who establishes that he is unable to pay such
3 fees. Mr. Elliott has already paid the \$5 filing fee and has, therefore, established that he is
4 financially able to pay the \$5 filing fee to commence this action. Whether Mr. Elliott may be
5 deemed to be entitled to discovery, the appointment of counsel, or IFP status on appeal, are all
6 separate questions which need not be resolved at this time.
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8 There is no right to have counsel appointed in cases brought under 28 U.S.C. § 2254
9 unless an evidentiary hearing is required. *See Terravona v. Kincheloe*, 852 F.2d 424, 429 (9th
10 Cir.1988); *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir.1992); and Rule 8(c) of the Rules
11 Governing Section 2254 Cases in the United States District Courts. The Court may exercise its
12 discretion to appoint counsel for a financially eligible individual where the “interests of justice so
13 require.” 18 U.S.C. § 3006A. At this juncture, the Court is not satisfied that the interests of
14 justice are best served by appointment of counsel. If the Court later determines that an
15 evidentiary hearing is required, or if Mr. Elliott later satisfies the Court that the interests of
16 justice otherwise require the appointment of counsel, Mr. Elliott will be given an opportunity to
17 establish that he is financially eligible for such an appointment.
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19 Accordingly, it is **ORDERED** as follows:

20 (1) Petitioner’s motion to supplement the state court record (ECF No. 18) is
21 **GRANTED as to (1)** the reply filed by Mr. Elliott in Washington Court of Appeals Case No.
22 39674-2-II and **(2)** state court transcripts relevant to claim four. Petitioner’s motion is **DENIED**
23 **at this time** in all other respects. Respondents shall provide these supplements to the state court
24 record **on or before January 6, 2012**.
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1 (2) The time for Petitioner to file his response shall be extended from November 21,
2 2011 until **February 6, 2012**. Respondents may file a reply **on or before February 10, 2012**.


3 The Clerk shall re-note the habeas petition on the Court's calendar for **February 10, 2012**.

4 (3) Petitioner's motions to amend (ECF No. 19) and motion for leave to proceed IFP
5 (ECF No. 20) are **DENIED**.

6 (4) In light of the foregoing, Petitioner's motion for an extension of time (ECF No.
7 24) is **DENIED as moot**.

8 (5) The Clerk shall send a copy of this Order to Petitioner and counsel for
9 Respondents.
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12 **DATED** this 29th day of November, 2011.

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14 Karen L. Strombom
15 United States Magistrate Judge
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